

EV 08-0013-CR 11 Y/H USA v Perkins
Judge Richard L. Young

Signed on 07/17/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

USA,)	
)	
Plaintiff,	)	NO. 3:08-cr-00013-RLY-WGH-11
)	
JASON HORNE,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
vs.	)	3:08-cr-13-RLY-WGH
)	
THOMAS PERKINS	)	-01
DAVID NEIGHBORS	)	-02
KESHAUN HORNE	)	-03
ANTONIO MILES	)	-04
LAFREDERICK TAYLOR	)	-05
DERRICK STANFIELD	)	-06
KAMAL SIMS	)	-07
JASON KIRK	)	-08
TREVOR PERRY	)	-09
JASON HORNE	)	-11
MAURICE NICHOLSON,	)	-12
Defendants.)	

ENTRY ON DEFENDANTS' MOTION TO SUPPRESS WIRETAP EVIDENCE

This matter is before the court on Defendant, LaFrederick Taylor's ("Defendant Taylor"), motion to suppress evidence obtained by wiretap. The Defendants remaining in this case, listed in the above caption, join in Defendant Taylor's motion (hereinafter "Defendants' motion"). For the reasons set forth below, Defendants' motion is **DENIED**.

I. Background

Defendants in this case are charged as members in a conspiracy to distribute cocaine and cocaine base in the Evansville, Indiana and surrounding areas. During the investigation of the charged conspiracy, the Government filed an application for wire surveillance, seeking to monitor the telephone used by Defendant David Neighbors ("Defendant Neighbors") and the telephone used by Jeremy Simmons ("Simmons"), a defendant in another charged conspiracy in

this court with alleged ties to the conspiracy charged in the present case. At the time the Government filed its application for wiretap surveillance, the two alleged conspiracies were indicted as one conspiracy in a single indictment. Since that time, the two alleged conspiracies have been indicted separately. The court ultimately granted the Government's request for wire surveillance on the phones of both Defendant Neighbors and Simmons.

The trial against the remaining Defendants in this case is scheduled to begin August 11, 2008. At trial, the Government will purportedly use evidence obtained through the wiretap surveillance against Defendants. Defendants now seek to exclude that wiretap evidence.

II. Hearing on the Motion to Suppress

As an initial matter, the court must address Defendants' request for a hearing on the present motion. The court need only have a hearing on a motion to suppress if the party requesting that hearing demonstrates a significant factual dispute. *See United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1990). Defendants request a hearing on the present motion but point to no factual dispute in the record that would require a hearing. Therefore, the court finds that a hearing on this matter is not appropriate. Defendants' request is denied.

III. Discussion of Motion to Suppress

Defendants seek to suppress the wiretap evidence because probable cause did not exist to approve the application for wiretap surveillance and, alternatively, because the Government did not establish the necessity for wiretap surveillance. While Defendants vigorously argue they have standing, the Government does not dispute that point, and the court will likewise not address it. The court addresses the probable cause and necessity arguments below.

A. Probable Cause

In order for a judge to approve a wiretap application, 18 U.S.C. § 2518(3) requires, in addition to the necessity requirement discussed in Section B, *infra*, that probable cause exists to believe (1) an individual is about to commit, is committing, or has committed a particular offense; (2) particular communications concerning that offense will be obtained through such interception; and (3) the facilities from which the wire communication is to be intercepted is being used in connection with the commission of the offense. 18 U.S.C. § 2518(3)(a), (b), (d). In *United States v. Dumes*, the Seventh Circuit held that probable cause for wire surveillance existed where a confidential informant made controlled purchases of cocaine from the target of the investigation and the target used the cellular phone to arrange those purchases. 313 F.3d 372, 379–80 (7th Cir. 2002).

Defendants assert that probable cause did not exist to issue the wiretap for Defendant Neighbors' phone because the Government relied only on the probable cause showing with respect to Simmons' phone to support its wiretap application for Defendant Neighbors' phone. The court disagrees. The affidavit filed with the application for wire surveillance indicates that the DEA executed controlled purchases of crack cocaine from Defendant Neighbors on two occasions, March 5, 2007, and April 11, 2007. (Affidavit of DEA Special Agent Douglas

Freyberger (“Freyberger Aff.”) ¶¶ 36–40, 60–65). On both of these occasions, an informant placed a call to Defendant Neighbors’ cell phone and arranged the purchase of crack cocaine from Defendant Neighbors over the telephone. (*Id.* ¶¶ 36, 60–61). During these phone calls, Defendant Neighbors used the cell phone number for which the Government was seeking a wiretap. (*Id.*). The facts in this case are nearly identical to those in *United States v. Dumes*, discussed above, and the court finds that probable cause existed to approve the application for wire surveillance on Defendant Neighbors’ phone.

Defendants also argue that probable cause was lacking because the wiretap application was “impermissibly tainted” with information about the other conspiracy, which was ultimately indicted separately. (Defs.’ Memo. in Support 6). However, the Defendants do not cite any legal authority in support of this argument, nor do they allege how this information tainted the wiretap application. At the point in time in which the wiretap application was filed, the conspiracies were charged in one indictment and the information contained in the application was relevant to the two targets of the proposed wiretap. The fact that the second target of the wiretap, Simmons, was ultimately charged in a separate indictment does not affect the application for the wiretap on Defendant Neighbors’ phone, considering that an independent basis for approving that wiretap existed.

B. Necessity

Defendants next challenge the necessity of the wiretap on Defendant Neighbors’ phone. An application for wire surveillance must contain “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(1)(c). The Government may establish its need for wire surveillance by establishing any one of the three

alternatives listed in 18 U.S.C. § 2518(1)(c). *United States v. Zambrana*, 841 F.2d 1320, 1329 (7th Cir. 1988). “[T]he government’s burden of establishing its compliance with subsection 2518(1)(c) is not great’ and should ‘be reviewed in a practical and commonsense fashion.’” *United States v. Ceballos*, 302 F.3d 679, 683 (7th Cir. 2002) (quoting *Zambrana*, 841 F.2d at 1329).

Defendants argue that the wiretap was not necessary because the Government uncovered some information relating to the charged conspiracy through traditional investigative techniques, and therefore, such techniques were sufficient to obtain further information regarding the alleged criminal activity. However, the affidavit in support of the wiretap application demonstrates that the investigative techniques used would be insufficient and/or unlikely to succeed to accomplish the ultimate identification and prosecution of the alleged conspiracy.

First, the use of informants, while successful in providing some initial information about the alleged conspiracy, was unlikely to advance the investigation. The informants refused to testify or were anonymous, indicating a probable refusal to testify. (Freyberger Aff. ¶¶ 79(a)–(c), 81(a)–(c), 82). Also, the informant information did not identify the customers of Defendant Neighbors’ alleged cocaine trafficking organization or the source of the cocaine. (*Id.*).

Second, the use of undercover officers, which was not attempted, was unlikely to be successful. Considering Evansville is a small city, Defendant Neighbors’ alleged drug trafficking organization operated in a somewhat closed circle, and the alleged drug traffickers would likely be suspicious of a new individual. (*Id.* ¶¶ 83–84). In addition, alleged drug traffickers in the Evansville area know the identity of many local narcotics officers. (*Id.* ¶ 83).

Third, telephone records and pen registers, while used initially in the investigation, were

unlikely to advance it. These investigative tools confirmed only that contact was made between two numbers but gave no insight into what was said during the conversations. (*Id.* ¶ 90).

Further, the pen registers and phone records did not identify the participants in the conversations, only the telephone numbers involved. (*Id.*).

Fourth, the use of physical surveillance was not a viable alternative to wire surveillance. The affidavit noted that, while officers had been able to conduct limited surveillance with some success, prolonged physical surveillance would not be effective because the relevant area was densely populated with little traffic activity. (*Id.* ¶ 92). Thus, the individuals doing the surveillance would likely be noticed and the investigation could be compromised. (*Id.*). Even if such surveillance were possible, the evidence obtained through those means would not accomplish the goal of the investigation because it could not link the individuals surveilled to the phone numbers linked to the alleged drug operation. (*Id.* ¶ 93).

Fifth, the use of search warrants would be unlikely to succeed in this case because the DEA had not identified the locations where a search warrant would be appropriate and executing a search warrant would alert the members of the alleged conspiracy to the ongoing investigation. (*Id.* ¶ 89(a), (f)).

Lastly, issuing grand jury subpoenas would be unlikely to succeed because the targets of the investigation would be unlikely to cooperate before the grand jury or would invoke their Fifth Amendment right to remain silent. (*Id.* ¶ 88).

Reviewing the above factual showings in a commonsense and practical light, the court finds that traditional investigative measures either failed and/or would be implausible, and the Government thus satisfied the necessity requirement for approving an application for wire surveillance. *See Ceballos*, 302 F.3d at 683–84 (finding necessity requirement for wiretap met

where the government demonstrated that traditional investigative techniques, such as the use of informants, undercover agents, telephone records and pen registers, and physical surveillance, had been and would continue to be insufficient to establish the full extent of the drug conspiracy).

Because the Government showed probable cause and the necessity requisite to gain approval of the wiretap application on Defendant Neighbors' phone, Defendants' motion to suppress wiretap evidence is denied.

IV. Conclusion

For the foregoing reasons, the court **DENIES** Defendants' motion to suppress evidence obtained by wiretap (Docket # 60). The court also **DENIES** Defendants' request for a hearing on the motion.

SO ORDERED this 16th day of July 2008.

s/ **Richard L. Young**

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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